IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

MARCOS GONZALES, *Respondent*

On Writ of Certiorari to the California District Court of Appeal

REPLY BRIEF FOR PETITIONERS

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AUTHORITIES CITED

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I. LOSS OF EMPLOYMENT RESULTING FROM A UNION'S DISCRIMINATORY REFUSAL TO REFER AN EMPLOYEE TO WORK OR TO CLEAR HIM FOR WORK MAY REASONABLY BE DEEMED TO BE WITHIN THE REGULATORY POWER OF THE NATIONAL LABOR RELATIONS BOARD AND HENCE WITHIN ITS EXCLUSIVE JURISDICTION

Respondent supports the jurisdiction of the state court upon the ground that there is no unfair labor practice in this case (Res. br. pp. 2, 7, 9). He maintains, as he must, that petitioners refused to dispatch him for work from the union hall because of his expulsion from membership, and that as a result he was un-

able to obtain employment in his trade (Res. br. pp. 5-6, 10, 11). He nevertheless contends that petitioners did not thereby violate Section 8(b) (2) of the National Labor Relations Act which makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . .". This contention is apparently based upon the view that on the record there is no evidence that the refusal of employers to hire respondent was brought about by specific requests directed by petitioners to these employers but resulted solely from petitioners' unassisted act of declining to dispatch respondent for work; accordingly, so the argument seems to run, the refusal of employers to hire respondent was not "caused" by petitioners (Res. br. pp. 10, 11, 14, 16, 25).

We stated in our opening brief, and we do not believe it can seriously be questioned, that the money judgment entered by the state court was awarded to redress conduct which "is a common unfair labor practice condemned by the National Labor Relations Act" (Pet. br. p. 10). Since respondent does dispute the existence of an unfair labor practice, it is desirable to be precise concerning the showing which is necessary to establish the exclusive jurisdiction of the National Labor Relations Board. It is enough that the conduct in controversy may reasonably be deemed to be within either the prohibition or the protection of the Act in order to require that "the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 478-479, 480, 481; see also, *Local 25, Teamsters*

Union v. *N.Y., N.H. & H. R.R.*, 350 U.S. 155, 161; *Retail Clerks International Ass'n.* v. *J.J. Newberry Co.*, 352 U.S. 987; *District Lodge 34, International Association of Machinists* v. *L. P. Cavett Co.*, October Term 1957, No. 453, decided November 12, 1957. Once it reasonably appears that the controversy is within the class that the Board is empowered to determine, the exclusiveness of the Board's jurisdiction of course does not turn upon the manner in which on a particular record the Board would decide the merits of the dispute. Whether there is sufficient or insufficient evidence to establish the elements of a violation is not material to the jurisdiction of the Board as the sole tribunal to make the determination either way. *Graybar Electric Co.* v. *Automotive Union*, 365 Mo. 753, 287 S.W. 2d 794, 801-803. Jurisdiction which is exclusive to sustain a claim must be equally so to dismiss a claim. The "power to decide a matter can hardly be made dependent on the way it is decided." *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 775.

We now show that loss of employment resulting from a union's refusal to refer or to clear an employee for work because of his expulsion from membership may reasonably be deemed to be within the regulatory power of the Board and hence within its exclusive jurisdiction.

1. The evidence of record shows as follows:

The money judgment covered respondent's loss of employment for the period from March 1952, when he was expelled from union membership, to June 1953, when illness incapacitated him from engaging in any employment (R. 21). In August 1952, five months

after respondent's expulsion from membership, a collective bargaining agreement went into effect entitled "Pacific Coast Master Agreement for Marine Machinists Between Pacific Coast Shipbuilders and International Association of Machinists" and enumerated local lodges (R. 73). Section 2 of that agreement, pertaining to "Union Security and Hiring of Men," provided that (R. 74, Pet. ex. 8):[1]

> (a) Union Shop: The Employer and the Union agree that membership in the Union shall be required as a condition of employment on and after the 30th day of employment or on and after 30 days following the execution of the Agreement, whichever comes later.
>
> (b) Hiring of Men: The Employer agrees to advise the Union of all job openings in the classifications of work set forth in the certification by the NLRB in Case No. 20-RC-1275 so that the Union may refer qualified men to the Employer for consideration for employment.
>
> (c) The Employer agrees to refer all newly hired and rehired employees within the classifications covered by this Agreement, to the Union and the Union agrees to issue clearances.
>
> (d) The Union agrees that it will upon request of the Employer furnish qualified men when available to the Employer for the classifications covered by this Agreement.
>
> (e) The Employer agrees to discharge or terminate the employment of any person who fails to qualify under paragraph (a) above within twenty-four (24) hours when requested to do so by the Union in writing.

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[1] The agreement is part of the record before this Court but has not been included in the printed record.

(f) The Union agrees that all employees hired under this Agreement shall be willing to, and shall submit to the making of such records as are, or may be required by the Employer for the purpose of identification and for security.

(g) The Employer may refuse to employ any person or may discharge any employee for any just and sufficient cause.

While the agreement went into effect in August 1952, the actual practice pertaining to the hire of marine machinists in the San Francisco area was the same before and after the effective date of that agreement (R. 73). By that practice, "as a rule," employers requiring marine machinists would telephone the union hall to inform the dispatcher of the number of men needed, and the dispatcher would refer the required number to the employer (R. 93, 57). The men at the union hall would be the first cleared for work (R. 93). To fill the jobs still remaining after the men present at the hall had been assigned, the dispatcher would consult the "out of work" cards of the men registered for employment at the hall and he would "automatically start to call the ones that are registered" (R. 93-94).

No "out of work" card is recorded for a marine machinist who is not a member of the Union (R. 94). Furthermore, a nonmember is dispatched for work from the union hall "Only in cases of where we couldn't supply them from the union membership" (R. 99). If a man "secures a job for himself," rather than by referral from the union hall, he obtains a letter from the employer requesting his assignment to the job, and upon the man's presentation of that letter to the dispatcher at the union hall, " he is automatically

cleared to the job, to go to work. Now if a man doesn't come in with a letter, he isn't cleared, that is for sure" (R. 98). However, a nonmember who presents a written request from an employer is apparently cleared only if no union personnel are available for work (R. 99).

For the twelve years preceding his expulsion from union membership, during which respondent had been working as a marine machinist in San Francisco, he had obtained employment through the union hall (R. 38). However, as the dispatcher testified, after respondent "was expelled and naturally coming up as an expelled member, he wouldn't be entitled to work" (R. 96). As respondent testified, he "applied regularly" for work at the union hall after expulsion but the dispatcher told him "he couldn't dispatch me on account of the trouble I had with the organization"; "he told me his hands were tied" (R. 57, 101-102). Respondent applied directly to employers of marine machinists for work but without success (R. 58). Had respondent secured a letter from an employer requesting his assignment to a job, the dispatcher would not have cleared him (R. 98).

2. Upon the evidence of record the conduct is unquestionably within the regulatory ambit of the National Labor Relations Board:

(a) The conduct here is well within the scope of the Board's decision in *International Union of Operating Engineers, Local No. 12*, 113 NLRB 655. There, under a dispatch system operated by a union, one Holderby had been regularly referred to work until his expulsion from union membership; thereafter the union refused to send him out on a job. *Id.* at 660. Describing the

theory of the complaint, the Board stated that the "General Counsel contends that, after expelling Robert Holderby from membership, the . . . [union] denied him further job referrals in violation of Section 8(b)(2) and (1)(A) of the Act," and that "the mere removal of Holderby's name from the contractual preferred list because he had lost his union membership was a violation of the Act . . . ." *Id.* at 662. The Board ruled that (*id.* at 663):

> We agree with the General Counsel. It is clear that, for the purposes of job referral, Local 12 refused to consider Holderby on an equal basis with individuals who were entitled to preference under the AGC agreement, simply because he was no longer a member of Local 12. "This denial of equal access to the available jobs was in itself and without more a restrictive imposition in violation of the Act." [*N.L.R.B.* v. *Local 803, International Brotherhood of Boilermakers*, 218 F.2d 299, 303 (C.A. 3), enforcing 107 NLRB 1011.]
>
> * * *
>
> We . . . find that by removing Holderby's name from the "Members" list because of his expulsion from the Union, thereby denying him equal access to jobs, the . . . [union] . . . violated Section 8(b)(2) and (1)(A) of the Act.

Among other relief, the Board ordered the union to "Make whole Robert A. Holderby for any loss of pay he may have suffered as a result of the discrimination against him . . . ." *Id.* at 655. The Court of Appeals for the Ninth Circuit enforced this part of the Board's order. *N.L.R.B.* v. *International Union of Operating Engineers, Local No. 12*, 237 F.2d 670, 674, cert. denied, 353 U.S. 910.[2]

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[2] Other parts of the Board's order were set aside for want of substantial support in the evidence.

Interestingly enough, Holderby had instituted suit in the state court of California to secure restoration to union membership. His action was dismissed upon the ground that he had failed to exhaust his internal union remedies and for that reason invocation of judicial intervention was premature. *Holderby* v. *International Union of Operating Engineers, Local Union No. 12,* 45 Cal. 2d 843, 291 P.2d 463. On respondent's theory, had the state court found in Holderby's favor and ordered his restoration to union membership it could as an incident to that judgment also order that he be made whole for the loss of wages he sustained as a result of the denial of employment to him based on his expulsion from union membership. There would thus be two tribunals, the state court and the federal agency, with jurisdiction to enter make whole orders based upon discriminatory loss of employment. "If the two . . . attempt to exercise a concurrent jurisdiction . . . , action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict." *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767, 776. "These are the very real potentials of conflict which lead us to allow supremacy to the federal scheme . . . " *La Crosse Telephone Corp.* v. *W.E.R.B.,* 336 U.S. 18, 26.

(b) The hiring procedure spelled out by the collective bargaining agreement is valid on its face. It is lawful to establish by contract that a union shall refer employees for work, and shall clear employees for work who have obtained jobs by direct application to the employer, so long as referral and clearance are

conducted by the union upon a nondiscriminatory basis.[3]

While "a referral system is not per se invalid," it constitutes a violation of Section 8(b) (1) (A) and (2) "if the union applies it discriminatorily." *N.L.R.B.* v. *Philadelphia Iron Works, Inc.*, 211 F.2d 937, 943 (C.A. 3). On the evidence of record that is the situation here. The state court found that "employers of the type of labor provided by members of this organization only hire through the union hiring hall" (R. 123). Petitioners generally operated the referral and clearance system of hiring so as to prefer members. And they specifically applied the system to cut off respondent's access to employment because of his expulsion from membership.

A union is responsible under Section 8(b) (2) of the Act for loss of employment which results from its discriminatory administration of the hiring function which it exercises pursuant to a referral and clearance system. The Board holds "that by being a party to a hiring arrangement which contemplates discrimination against nonunion employees a union becomes liable for any discrimination pursuant to the arrangement."[4] "And if an employer rejects workers who, for discriminatory reasons, have not been cleared or

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[3] *Hunkin—Conkey Construction Co.*, 95 NLRB 433, 435, and cases cited at note 4; *N.L.R.B.* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 514 (C.A. 9), cert. denied, 346 U.S. 814; *Eichleay Corp.* v. *N.L.R.B.*, 206 F. 2d 799, 803 (C.A. 3); *Del E. Webb Construction Co.* v. *N.L.R.B.*, 196 F. 2d 841, 845 (C.A. 8); *N.L.R.B.* v. *F. H. McGraw and Co.*, 206 F. 2d 635, 641 (C.A. 6).

[4] N.L.R.B., Nineteenth Annual Report, p. 103 (1954); *Great Atlantic and Pacific Tea Co.*, 117 NLRB 1542, 1545; *Permanente Steamship Corp.*, 107 NLRB 1111, 1113.

given work permits by the union as required under the agreement, the union will be held to have violated section 8(b) (2) even though it did not specifically request the employer to deny them employment."[5]

Accordingly, contrary to respondent's apparent contention, where a union is a party to an employment system by which the employer hires upon referral or clearance by the union, the union's liability under Section 8(b) (2) is complete upon a showing of a discriminatory refusal to refer or clear without a further showing that the union has specifically requested the employer to do that which under the hiring system the employer is obligated to do.

(c) Upon respondent's own showing, it would be fictive to say that the employers' refusal to hire respondent was not actively caused by petitioners, and in acquiescence with their understood wish, even in the absence of a specific request by petitioners not to employ him. Respondent's petition for writ of mandate alleged that as a union member he had "the right to work . . . under collective bargaining agreements with employers . . . " (R. 2). Respondent's counsel in his opening statement to the trial court stated that (R. 36):

> Since March of 1952 [after his expulsion from union membership], however, the Plaintiff has been unable to obtain any work because everytime he applies for a job, he is told to go to the hall to get a clearance, and when he goes to the Local Lodge hall he is told that no clearance can be given

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[5] N.L.R.B., Seventeenth Annual Report, p. 186 (1952); *International Union of Operating Engineers, Local No. 12*, 113 NLRB 655, 663, enforced as modified, 237 F. 2d 670, 674 (C.A. 9), cert. denied 353 U.S. 910; *Mundet Cork Corp.*, 96 NLRB 1143, 1149-50; *Utah Construction Co.*, 95 NLRB 196, 206-207.

> until he pays the fine and apologizes . . . and is reinstated as a member. . . .

In response to questions by his own counsel, respondent testified that when he applied for work directly to employers, "Lot of times they did need a man, but they told me they couldn't employ me, they didn't want no picket line there (Tr. 36); on one occasion, a prospective employer asked respondent "how I was with the union, and I told him the truth, that I . . . just was out, I was expelled. He said he was sorry, he couldn't do nothing" (Tr. 37).[6] While these answers were stricken as hearsay (*ibid.*), it is patent that the jurisdiction of the Board cannot vary with the admissibility of the evidence marshalled in support of a claim.

Furthermore, upon advice of his own counsel, respondent filed an unfair labor practice charge with the Board (R. 67). According to respondent, he withdrew that charge because he was reluctant to implicate the local lodge in a proceeding before the Board (R. 68). And the court below, both in its initial decision (Pet. br. pp. 1a-2a) and in its decision on rehearing (Pet. br. p. 5a), recognized that petitioners' conduct constituted an unfair labor practice. It sought to justify the exertion of jurisdiction by the state court upon the ground, not that the conduct did not constitute an unfair labor practice, but that it was litigated under the rubric of a breach of contract (R. 127, 128-129). As we stated in our opening brief, however, "It is the conduct which the state court presumes to regulate, not the label which it chooses to affix to it, that is decisive" (p. 14). Mischievous diversity is no less be-

[6] "Tr." refers to the typewritten transcript of record on file with this Court which has not been included in the printed record.

cause the identical conduct taken in hand is called by a different name. See *District Lodge 34, International Association of Machinists* v. *L. P. Cavett Co.*, October Term 1957, No. 453, decided November 12, 1957, where respondent contended that the state court had jurisdiction because of an alleged breach of contract.

(d) Quite apart from Section 8(b) (2) of the Act, petitioners' conduct may reasonably be deemed to be within the independent reach of Section 8(b) (1) (A) of the Act.

Section 8(b) (1) (A) forbids a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . . ." Section 7 states that employees shall have the right to "assist labor organizations", but it also confers the converse right to "refrain from any or all of such activities" except as limited by a valid union security agreement. While a valid union security agreement exists here, it may be lawfully invoked to cause the discharge of an employee only for the reason that he is delinquent in the payment of periodic dues or initiation fees (*Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40-42), a reason not involved in this case.

As the penalty for falsely accusing a union officer of having assaulted him or having instigated an assault upon him, respondent was required by petitioners to pay a fine and to make an apology. Respondent refused to comply and for that reason was expelled from union membership and denied access to employment. To comply with a penalty imposed by a labor organization is clearly to assist it. To refuse to comply is just as clearly to refrain from assisting it. See *National Labor Relations Board* v. *George W. Reed*, 206 F.2d 184, 189

(C.A. 9); *National Labor Relations Board* v. *Philadelphia Iron Works, Inc.*, 211 F.2d 937, 944 (C.A. 3). That abstention is protected from restraint and coercion. To deny an employee access to employment because of that abstention is to restrain or coerce him within the meaning of Section 8(b) (1) (A).

(e) Should it be thought that petitioners' conduct may not reasonably be deemed within the reach of Sections 8(b) (1) (A) or 8(b) (2) of the Act, then it must reasonably be deemed to be conduct which the Act contemplates that a labor organization is free to engage in. Congress has legislated comprehensively upon the subject of discrimination in employment (*Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17), and except for authorizing a state to prohibit an agreement requiring membership in a labor organization as a condition of employment (section 14 (b); *Algoma Plywood & Veneer Co.* v. *W.E.R.B.*, 336 U.S. 301), it has occupied the field. Conduct which is allowable within this field is just as much a part of the federal scheme as conduct which is prohibited. It is implicit in the Act that conduct which is not forbidden is within the permissible range of activity. *Garner* v. *Teamsters Union*, 346 U.S. 485, 499-500. And it is no less an obstruction of federal policy for a state to prohibit what the Act permits as to permit what the Act prohibits. *Ibid; United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62. It follows that if petitioners' conduct is not reached by Sections 8(b) (1) (A) or 8 (b) (2), it may not be reached by the states by local law.

3. The jurisdiction of the National Labor Relations Board is exclusive if it may reasonably be said that the conduct in controversy is comprehended by the

federal scheme. It is patent that petitioners' conduct is within that class. This Court need not and should not decide more.

II. RESPONDENT'S RELIANCE UPON SYRES V. OIL WORKERS INTERNATIONAL UNION, 350 U.S. 892, IS MISPLACED

Respondent's reliance upon this Court's decision in *Syres* v. *Oil Workers International Union,* 350 U.S. 892, to support the state court's jurisdiction here is misplaced (Res, br. pp. 21-22). Involved in *Syres* is the enforcement of the duty of a statutory bargaining agent to represent all employees within the bargaining unit fairly and without discrimination. Violation of that duty does not constitute an unfair labor practice within the meaning of the National Labor Relations Act, and is therefore outside the regulatory power of the National Labor Relations Board to investigate, prosecute, and redress under that rubric. The Board exercises a limited authority to revoke a certification upon a showing that the statutory agent is in default of its duty of fair representation. *Hughes Tool Co.*, 104 NLRB 318. But that authority is too marginal to warrant the conclusion that it constitutes the sole means for vindication of that obligation.[7] It is fair to assume that this Court's *per curiam* reversal in *Syres* approves the views expressed in the dissenting

[7] The inconclusive character of the Board's authority is explored in, and the Court is respectfully referred to, the Board's *amicus* brief in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, October Term, 1952, Nos. 193 and 194.

opinion of Judge Rives, and he explained that (223 F. 2d 739, 747):

> There are no adequate remedies available to appellants under the National Labor Relations Act or through the Board. The National Labor Relations Act gives the Board power to remedy specific "unfair labor practices" as defined in said Act. Nowhere is the Board given power to prevent discrimination because of race or color, except by very limited procedure which would afford no adequate remedy in this case.
>
> It is suggested that appellants could petition the Board for (1) a separate bargaining unit of their own, or (2) decertification of their bargaining representative. There is, however, no administrative means by which the negro members can secure adequate separate representation for the purposes of collective bargaining. Decertification by the Board would afford no remedy at all.

Since the duty of fair representation is only incidentally and inconclusively within the Board's regulatory power, it is patent that the "statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207; see also, *Conley* v. *Gibson*, October Term 1957, No. 7, decided November 18, 1957. In contrast, in the present case, the Board's authority over the subject matter of discrimination in employment based on union membership and activity or the want of either, and the scope of its remedial power to re-

dress wrongs in that field, are full and complete. Its jurisdiction is therefore exclusive.

Respectfully submitted,

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